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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION (a corporation),
Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN.

BRIEF FOR PETITIONER

on Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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In the Supreme Court
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October Term, 1936

No. 558

Alaska Packers Association (a corporation),
Petitioner,

vs.

Warren H. Pillsbury, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Frank Weidemann.

BRIEF FOR PETITIONER

on Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The District Court rendered no opinion. Its findings and conclusions are at R. 204-208. The opinion of the Circuit Court of Appeals on the motion to dismiss the appeals to it

(R. 260) is reported in 78 F.(2d) 587. The opinion and dissenting opinion on the merits (R. 271, 280) are reported in 85 F.(2d) 758. In view of the limitation in the order granting certiorari, only the opinion on the motion to dismiss is material.

STATEMENT OF THE CASE.

Section 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940; U.S.C. 28:230) provides as follows:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit, as revised June 27, 1928, from a similar rule adopted May 21, 1900 (100 Fed. iii, quoted R. 262), provides in part as follows:

> "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of."

The case is before this court upon the following order:

> "The petition for writ of certiorari is granted, limited to the question of the operation of the Act of February 13, 1925, and its effect upon Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for

the Ninth Circuit with respect to the mode of taking an appeal."

The question arises as follows: The respondent Frank Weidemann was injured on board a ship belonging to petitioner and lying in a shipyard at Alameda, California. The respondent Warren H. Pillsbury, as deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; U.S.C. 33:901 et seq.) made an award in Weidemann's favor. The District Court set aside the award and enjoined Pillsbury from enforcing it (R. 231).*

Respondents Weidemann and Pillsbury filed and served separate notices of appeal to the Circuit Court of Appeals (R. 233, 235). Petitioner moved that court to dismiss the appeals on the ground that they had not been petitioned for or allowed (R. 257). The Circuit Court of Appeals denied the motion (R. 260; 78 F. (2d) 587), holding that section 8(c) of the Act of February 13, 1925, does not require that an appeal in admiralty shall be applied for and allowed; that its Admiralty Rule 1, providing for the taking of an appeal merely by filing with the clerk and serving upon the adverse party notice of appeal, is, therefore, valid; and that accordingly it had jurisdiction of the appeals in this case, notwithstanding they had not been allowed.**

*The facts involved in this ruling are not material under the order granting certiorari and therefore are not stated. They appear at pages 7 to 12 of the petition for certiorari.

**We find no rule in any other circuit corresponding to Admiralty Rule 1 of the Circuit Court of Appeals for the Ninth Circuit. The rule requiring that appeals, generally, be applied for and allowed is substantially the same in all circuits, including the Ninth. Rule 11 of the First, Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, Rule 10 of the Second and Seventh Circuits,

The foregoing statement comprises all of the facts which appear to us to be pertinent under the limitation in the order granting certiorari. That order, it seems to us, confines review in this court to the question of the validity of Admiralty Rule 1 under the Act of February 13, 1925: that is to say, the question whether allowance of the appeals was necessary—not, whether they were in fact allowed. The Circuit Court of Appeals gave no consideration to the latter question, evidently being of the view that there was no substantial basis for raising it on this record. It pointed out (R. 264) that "The appeals in this case were taken by filing and serving notices of appeal, as provided in Ad-

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and Rule 23 of the Eighth Circuit. (See "Court Rules," Vol. 1-A, L.Ed. Digest of the United States Supreme Court Reports, Supplement No. 3.)

Numerous provisions of the rules of the various Circuit Courts of Appeals, other than the rules just mentioned, disclose a uniform practice requiring the allowance of all appeals:

First Circuit—Rules 13 (par. 2), 14 (pars. 9, 12), 16 (par. 3), 35.
Second Circuit—Rules 32, 36.
Third Circuit—Rules 13 (par. 2), 14 (pars. 1, 8), 15 (par. 1), 17 (par. 2).
Fourth Circuit—Rules 13 (par. 2), 14 (pars. 1, 5, 7), 16 (pars. 1, 2), 19 (par. 3), 23 (par. 6), 36 (pars. 2, 3, 5), 37, 40; and see appendix to the rules, "Instructions as to Taking Appeals, Making Up Records, etc."
Fifth Circuit—Rules 13 (par. 2), 14 (par. 5), 16 (par. 1), 23 (par. 8), 37 (pars. 1, 2), 39.
Sixth Circuit—Rules 13, 14, 15 (par. 1), 18 (par. 2), 34 (pars. 1, 4).
Seventh Circuit—Rules 12 (par. 2), 13 (pars. 1, 3), 13-a, 14 (par. 1), 31 (par. 1).
Eighth Circuit—Rules 24 (par. 1), 25 (par. 2), 26 (par. 1).
Ninth Circuit—Rules 13 (par. 2), 16 (par. 1).
Tenth Circuit—Rules 12 (par. 2), 13 (pars. 1, 2), 14 (par. 1), 31.

The Second and Ninth are the only circuits having special admiralty rules. The rules of the First and Fourth Circuits, however, refer expressly to the requirement that appeals in admiralty, like all other appeals, must be allowed. See Rule 14, pars. 8 and 9, of the First Circuit; Rule 14, par. 7, of the Fourth Circuit, as supplemented by the instructions contained in the appendix to those rules with respect to the record on appeal, especially, the note to the form of memorandum to be inserted in the record as provided by section 7 of Rule 14 ("Court Rules," Supplement No. 3, supra, p. 68).

Rule 37 of the Second Circuit provides that admiralty appeals shall be taken by serving and filing notice, but also provides, by amendment adopted December 10, 1928: *"An allowance of the appeal shall be obtained and filed with the notice."* [All italics throughout this brief are ours unless otherwise stated.]

It thus appears that Admiralty Rule 1 of the Ninth Circuit provides the only exception in the rules of the ten circuits with reference to the requirement that appeals in all cases shall be allowed.

miralty Rule 1." The memorandum submitted by the Solicitor General prior to the granting of certiorari suggests, however, a question other than that of the validity of Admiralty Rule 1, namely, whether two orders obtained by respondent Pillsbury—one for the transmission of original exhibits (R. 243), and the other for the omission of certain material from the apostles (R. 250-251)—were the equivalent of an allowance of Pillsbury's appeal. Weidemann, who obtained no such orders, argues that the orders as to Pillsbury dispensed with the necessity for the allowance of Weidemann's appeal (see Weidemann's Brief Opposing Issuance of Certiorari, p. 12). Notwithstanding our belief that this question is outside the scope of the order allowing certiorari, we will answer it in our argument.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals erred in deciding that it had jurisdiction to entertain the appeals from the District Court and erred in denying petitioner's motion to dismiss the appeals.

SUMMARY OF ARGUMENT.

First. The statute requires that all appeals, including admiralty appeals, be applied for and allowance thereof obtained. Its language is clear to this effect and presents no question of construction. This has been decided in five circuits, with the case here under review alone standing to the contrary.

Second. Even if the question were one of construction, the statute should be construed as making allowance of appeals a jurisdictional requisite. Such construction accords with the intention of Congress, and with the uniform course of decisions under this statute and prior statutes, and protects the dockets from appeals in cases where jurisdiction obviously does not exist or the conditions of appeal have not been complied with.

Third. Answering considerations urged by the Circuit Court of Appeals (R. 265, et seq.), the question here involved does not turn on whether the statute makes appeals discretionary or allows them as of right. There is nothing inconsistent about requiring that appeals be applied for and allowed in cases where they are of right. Such is and has been the uniform and time-honored practice of this court and of the lower federal courts. Neither does the expression that "an appeal may be taken," in the statutes mentioned in the opinion of the Circuit Court of Appeals, indicate that allowance thereof is not required.

Fourth. The orders sending up original exhibits and authorizing omissions from the apostles were not equivalent to an allowance of Pillsbury's appeal. Furthermore, if Pillsbury ever had any right of appeal under the Longshoremen's and Harbor Workers' Compensation Act under the circumstances here presented, such right has become moot. This is because Weidemann is the sole beneficiary of the decree, and the decree has become final *against* Weidemann, so that there is no right which Pillsbury could enforce or vindicate if his appeal were successful. Still further, the court was without jurisdiction because there was no summons and severance as to Weidemann.

ARGUMENT.

FIRST: THE STATUTE REQUIRES THAT ALL APPEALS, INCLUDING ADMIRALTY APPEALS, BE APPLIED FOR AND ALLOWANCE THEREOF OBTAINED. ITS LANGUAGE IS CLEAR TO THIS EFFECT AND PRESENTS NO QUESTION OF CONSTRUCTION. THIS HAS BEEN DECIDED IN FIVE CIRCUITS, WITH THE CASE HERE UNDER REVIEW ALONE STANDING TO THE CONTRARY.

In *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750, certiorari denied (280 U. S. 584), the appellants filed a notice of appeal but made no application to the court and obtained no order of allowance. The Circuit Court of Appeals dismissed the appeal. It reviewed many decisions of this court, and of other federal courts, under earlier statutes, all holding that allowance of appeal is a jurisdictional requisite. Then, with respect to section 8(c) of the Act of February 13, 1925, the court said (p. 752):

> "But unless some novel effect is to be given to the substitution of the words 'unless application therefor be duly made' for the former provision that no appeal or writ of error 'shall be taken or sued out' the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that *the appellate court does not acquire jurisdiction until the appeal is allowed, either in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result* (viz. as in *Randall Co. v. Foglesong Machine Co.*, supra). *The mere filing with the clerk of an application or notice of appeal, not presented to the judge, cannot be construed as an application 'duly made,' within the language of 28 USCA §230, which in terms refers to an allowance. Such ap-*

plication, to be in due form, must be made to the judge and acted upon by him.''

In accord with the foregoing decision from the Sixth Circuit, and all holding that under the statutory language a Circuit Court of Appeals is without jurisdiction of an appeal taken on notice alone, are the following decisions from the First, Fourth, Seventh, and Eighth Circuits:

Baez v. People of Puerto Rico (1st C.C.A., 1936) 82 F. (2d) 317, 320-321;

Osborn v. United States (4th C.C.A., 1931) 50 F. (2d) 712, 713;

United States v. New National Coal & Mining Co. (7th C.C.A., 1934) 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th C.C.A., 1930) 40 F. (2d) 871;

Share v. United States (8th C.C.A., 1931) 50 F. (2d) 669, 670.

We know of no contrary authority, except the present case, which is not only against the above cited decisions from five other circuits, but also against earlier decisions in the Ninth Circuit itself.

In *McBee v. Palmer* (9th C.C.A., 1934) 73 F. (2d) 342, the court held that an appeal in a "controversy in bankruptcy," though an appeal of right, cannot be taken by mere notice, but that it must be applied for and allowance obtained. The court quoted with approval from *Ross v. White*, supra, then cited *Robie v. Hart, Schaffner & Marx*, supra, and said (p. 344):

"This case holds that the 'notice of appeal' is not sufficient to perfect an appeal but that application therefor must be duly made and allowance had."

To the same effect is *Von Holt v. Carter* (9th C.C.A., 1932) 56 F. (2d) 61, dismissing an appeal from Hawaii, where a petition for appeal had been filed but not presented or allowed within the statutory period. The court said (p. 63):

> "The facts herein bring this case squarely under the rule laid down by the Circuit Court of Appeals for the Sixth Circuit in the case of *Ross v. White*, 32 F. (2d) 751. That case is so exhaustive in its citations of authorities discussing the question here involved, and is so well-reasoned, that any repetition here of the points there considered would be superfluous. It is clear that the mere filing of a petition for appeal in the clerk's office, even though addressed to the Court, is of no avail, unless accompanied by an allowance of an appeal by the Court, *and cannot be considered an application 'duly made' within the language of the statute which in terms refers to an 'allowance'.*"

It is true that none of the foregoing cases involved an appeal in admiralty. But the statute is general—"*No appeal* • • • shall be *allowed* unless *application* therefor be duly made • • •". This language includes admiralty just as well as law, equity, or bankruptcy. It was evidently so considered in *The Ruth* (3rd C.C.A., 1927) 20 F. (2d) 314, an admiralty case, in which the court said (p. 316):

> "If the appellant was late in applying for the allowance of an appeal there is substance in the ground for dismissal because the limitation of this section is mandatory and therefore jurisdictional."

In *The Ruth* the appeal was not dismissed because it had been seasonably applied for and the delay in allowance was attributable to the court. The case shows, however, that

the court considered the allowance of an admiralty appeal to be a jurisdictional requisite under the statute here involved.

This court apparently has not had occasion to consider the provisions of section 8(c) of the Act of February 13, 1925. Nevertheless, the foregoing decisions find direct confirmation in the practice of this court requiring the allowance of appeals in all cases* under the terms of section 8(a) of the same statute, which contains identical provisions respecting the mode of appeal.**

If, as the foregoing considerations show, section 8(c) of the statute requires that appeals to the circuit courts of appeals be applied for, and makes it a requisite of appellate jurisdiction that allowance thereof be obtained, then it follows that Admiralty Rule 1 of the Ninth Circuit is invalid. The circuit courts of appeals have only such jurisdiction as is conferred by statute (*Realty Co. v. Montgomery* (1932) 284 U. S. 547, 549). Their rule-making power is confined to rules for conducting "the business of the court *within its jurisdiction as conferred by law*" (Judicial Code, sec. 122; U.S.C. 28:219). Court rules cannot alter or do away with statutory requirements (*Hudson v. Parker* (1895) 156 U.S. 277, 284; *Meek v. Centre County Banking Co.* (1925) 268 U.S. 426, 433-435; *Chisholm v. Gilmer* (1936) 299 U.S. 99; *In re Foster Const. Corporation* (2d C.C.A., 1931) 49 F. (2d) 213, 214).

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*Rules 12, 36, 46, of the Rules of this court.

**"That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *." Act of February 13, 1925, section 8(a), 43 Stat. 936, 940; U.S.C. 28:350.

SECOND: EVEN IF THE QUESTION WERE ONE OF CONSTRUCTION, THE STATUTE SHOULD BE CONSTRUED AS MAKING ALLOWANCE OF APPEALS A JURISDICTIONAL REQUISITE. SUCH CONSTRUCTION ACCORDS WITH THE INTENTION OF CONGRESS, AND WITH THE UNIFORM COURSE OF DECISIONS UNDER THIS STATUTE AND PRIOR STATUTES, AND PROTECTS THE DOCKETS FROM APPEALS IN CASES WHERE JURISDICTION OBVIOUSLY DOES NOT EXIST OR THE CONDITIONS OF APPEAL HAVE NOT BEEN COMPLIED WITH.

If the problem here were to construe the statute rather than to apply its clear language, the first inquiry would be concerning the intent of Congress in passing it. This intent can be shown with unusual clearness.

In the hearings on the bill which later became the Act of February 13, 1925, Mr. Justice Van Devanter pointed out that section 8(c) required application for an appeal (Hearing before the Judiciary Committee of the House of Representatives on H.R. 8206, December 18, 1924, p. 16):

> "In section 8 (c) the bill fixes three months as the period within which *application must be made* for a writ of error or appeal to take any case before a circuit court of appeals for review."

By section 2 of the Act of January 31, 1928, it was provided that an appeal might be taken on notice only and that

> "no petition of appeal or allowance of an appeal shall be required" (45 Stat. 54).

This provision was in force for less than three months. On April 26, 1928, it was repealed (45 Stat. 466; U.S.C. 28:861b), for reasons given in House Report No. 1071, 70th Cong. 1st Sess., accompanying the bill (H.R. 12441) which became the Act of April 26, 1928. This report begins with

a favorable recommendation by the committee, together with a recital of the terms of the Act, and continues:

> "It would appear, and an instance of it has already transpired, that this section would create such a loose method of practice with regard to cases in which the writ of error is abolished that there is great necessity for remedial legislation limiting the freedom with which appeals can be taken and restoring those safeguards which surrounded the granting of the writ of error and protected it from abuse.
>
> Under the Act of January 31, 1928, no petition of appeal or allowance of an appeal is required. This could lead to great abuse because there being no regulation requiring submission by petition or otherwise of the case to the court for the purpose of determining whether or not it involved a federal question that could be made the subject of appeal or was in and of itself a case appealable to the higher courts. [The report then refers also to the absence of provision for bond for costs.]
>
> If the provisions of section 2 remain unamended the courts docket may be burdened very greatly. It has, therefore, been deemed wise to offer the amendment contained in this bill.
>
> The chief justice and another member of the court appeared before this committee and approved of this amendment."

The foregoing quotation shows that the statute modifying the Act of February 13, 1925, by doing away with the necessity of petitions for and allowances of appeals was repealed to restore that requirement—a meaningless proceeding if the requirement did not exist under the Act of February 13, 1925, or if it could be destroyed by a court

rule. And the reasons which motivated Congress in this change of the law are just as applicable to admiralty appeals as to other appeals.

The purpose and intent of the statute, as understood by Congress, can be further and more recently illustrated. On March 25, 1935, the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice Brandeis, at the request of the Judiciary Committee of the Senate, appeared before that Committee to present the views of the members of the court with respect to a pending bill dealing with the court's appellate jurisdiction. Among other things that bill provided for the taking of appeals merely by the filing of notice. In the course of his remarks, Mr. Justice Van Devanter pointed out that such a provision is inconsistent with existing legislation, and directed the attention of the Committee to the reasons which underlay the amendment restoring the necessity for allowance of appeals (Hearing before the Committee on the Judiciary, United States Senate, 74th Cong. 1st Sess. on S. 2176, March 25, 1935, p. 10):

> "I think there is not anything more that I wish to state, but I will say just this closing word. It is only indirectly apropos now. That is in reference to the laudable disposition about 12 years ago to simplify resort to our Court from State courts. There was an act passed—Senator Norris will recall it—that an appeal from a State court could be taken by just lodging a notice with the clerk of the supreme court of the State. That seemed simple on its face. It seemed as though it was in the interest of avoiding technicalities here and there. It had not been in force 10 days before there were appeals from convictions of murder in the State of Washington and two or three other

States where there was not an iota of a Federal question. The Court was about to adjourn for the term. The appeals were holding up the whole matter of carrying the judgments into execution.

All of those cases, if presenting a Federal question, could have come to us by appeal or writ of certiorari, but not if devoid of such a question. Chief Justice Taft, Justice Brandeis, and I had an interview with Senator Norris and Senator Walsh. A bill was passed to eliminate the loose appeals, and, barring two or three appeals—I think four—no harm was done. *Legislation along these lines should fit in with the existing legislation—with the existing system—and the principles upon which the existing legislation proceeds.*"

Since the intention of Congress thus clearly appears, and since there is no distinction either in the reason for the statute or in the statutory language between admiralty appeals and other appeals, it follows that the earlier law on allowance of appeals is not a material factor. If, however, it should be considered, it is a further argument against the decision below. Allowance of appeals has been considered jurisdictional throughout the history of the federal courts, even under statutory language less explicit than that here involved, a fact which Congress knew when it passed the present statute, and as to which we find no distinction in the authorities between admiralty and other causes.*

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*Petitioner does not concede, as stated at page 4 of respondent Weidemann's Brief Opposing Issuance of Certiorari, that Admiralty Rule 1 of the Ninth Circuit was valid and the procedure it provided adequate under the Act of March 3, 1891. We do believe that, in view of the unequivocal terms of section 8(c) of the Act of February 13, 1925, the prior procedure is not controlling. Nevertheless, as stated in the text above, we contend that the allowance of appeals in admiralty has been a jurisdictional requirement since the formation of the federal judiciary.

The 25th section of the Judiciary Act of 1789 (1 Stat. 85, 86) provided that upon writs of error from this court to a state court, the citation should be signed by the chief justice, or judge or chancellor of the state court, or by a justice of the Supreme Court. Under this provision, later carried into section 999 of the Revised Statutes (U.S.C. 28:868), it was held that unless the writ were allowed, this court acquired no jurisdiction. In *Havnor v. New York* (1898), 170 U.S. 408, 410, the court said (p. 410):

> "It was essential, *in order to confer jurisdiction on this court,* that the chief judge of the Court of Appeals of New York or his lawful substitute or a Justice of this court should have allowed the writ and signed the citation.

Thus, it is provided in the Revised Statutes as follows:

> 'Sec. 999. When the writ' (of error) • • • 'is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, a judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice.'

The provision referred to was contained in the twenty-fifth section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 86, and section 7 of the act of February 5, 1867, c. 29, 14 Stat. 387. It was construed in *Bartemeyer v. Iowa,* 14 Wall. 26, where the court, taking notice *sua sponte* of the fact that there had been no proper allowance of a writ of error, said (p. 27):

> '• • • *It has been the settled doctrine of this court that a writ of error to a state court must be allowed*

> *by one of the judges above mentioned, or it will be dismissed for want of jurisdiction,* and the case before us raises the question whether the writ has been allowed by the judge authorized to do so.' "

Similar cases are *Twitchell v. Commonwealth of Pennsylvania* (1868) 7 Wall. 321, 324, 325; *Gleason v. Florida ex rel. Attorney General* (1869) 9 Wall. 779, 783, 784; *Hartford Fire Ins. Co. v. Van Duzer* (1869) 9 Wall. 784, note; and *Butler v. Gage* (1891) 138 U.S. 52, 55.

With respect to appeals and writs of error bringing causes from lower federal courts to this court, section 999 of the Revised Statutes (U.S.C. 28:868), tracing back to the Judiciary Act of 1789 (see 1 Stat. 84, 85, 86), similarly provided for signature of citation by designated judges, and this was held to make allowance of the appeal or writ of error a jurisdictional requirement. Cases so holding are *Washington County v. Durant* (1868) 7 Wall. 694; *Pierce v. Cox* (1869) 9 Wall. 786, 19 L. Ed. 786; *Barrel v. Transportation Company* (1865) 3 Wall. 424, reported under the name *Barrel v. The Mohawk,* 18 L. Ed. 168, an admiralty appeal; *Credit Co. v. Ark. Central Railway* (1888) 128 U.S. 258; *Monger v. Shirley* (1872) 131 U.S., Append., cx; *Brandies v. Cochrane* (1881) 105 U.S. 262; and *Brown v. McConnell* (1888) 124 U.S. 489, 491.

A brief history of the rule in this court is given at sections 347, 366, and 373 of Robertson and Kirkham's *Jurisdiction of the Supreme Court of the United States.*

Admiralty cases applying or referring to the rule that allowance of appeal is jurisdictional are *Barrel v. Transportation Company* (1865) 3 Wall. 424, supra; *McLellan v.*

United States (1812) 1 Gall. 227, Fed. Cas. No. 8895; *The Spark v. Lee Choi Chum* (1872) 1 Sawy. 713, Fed. Cas. No. 13,206; *Chamberlain Transp. Co. v. South Pier Coal Co.* (1903) 126 Fed. 165, 166; *The Douro* (1865) 3 Wall. 564, 566; *The Protector* (1870) 11 Wall. 82, 86; *The Dos Hermanos* (1825) 10 Wheat. 306, 311.

As to the circuit courts of appeals, prior to the Act of February 13, 1925, appeals from lower courts were governed by the Act of March 3, 1891 (c. 517, 26 Stat. 829). Section 11 of this statute provided in part:

> "That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed * * *."

The section further made effective as to the circuit court of appeals

> "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error * * *."

As already shown, the existing "methods and system of review" made allowance of appeals jurisdictional.

Section 11 further provided that

> "any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

This statute contemplated allowance of appeals, and with respect to it the court in *Green v. City of Lynn* (1st C.C.A., 1898) 87 Fed. 839, said (p. 840):

> "Though the supreme court has often said that signing a citation or approving a bond is equivalent in law to the allowance of an appeal, it has never said, so far as we can discover, that an allowance in some form could be dispensed with, * * *. The act of March 3, 1891, by its provisions recognizes the necessity for an allowance * * *."

Similar cases are *American Seating Co. v. Bullard* (6th C.C.A., 1923), 290 Fed. 896, 899, and *Blaffer v. New Orleans Water Supply Co.* (5th C.C.A., 1908), 160 Fed. 389, 390, 391.

From all points of view it is clear that section 8(c) of the Act of February 13, 1925, makes allowance of appeal a jurisdictional requisite, and should be so construed if its language permitted of construction. This is shown by its history, but even more clearly by the reasons which prompted Congress in passing it, all of which apply to admiralty appeals in the same way as other appeals.

THIRD: ANSWERING CONSIDERATIONS URGED BY THE CIRCUIT COURT OF APPEALS (R. 265, ET SEQ.), THE QUESTION HERE INVOLVED DOES NOT TURN ON WHETHER THE STATUTE MAKES APPEALS DISCRETIONARY OR ALLOWS THEM AS OF RIGHT. THERE IS NOTHING INCONSISTENT ABOUT REQUIRING THAT APPEALS BE APPLIED FOR AND ALLOWED EVEN IN CASES WHERE THEY ARE OF RIGHT. SUCH IS AND HAS BEEN THE UNIFORM AND TIME-HONORED PRACTICE OF THIS COURT AND OF THE LOWER FEDERAL COURTS. NEITHER DOES THE EXPRESSION THAT "AN APPEAL MAY BE TAKEN," IN THE STATUTES MENTIONED BY THE CIRCUIT COURT OF APPEALS, INDICATE THAT ALLOWANCE THEREOF IS NOT REQUIRED.

The Circuit Court of Appeals considered at some length the question whether, under section 8(c) of the Act of February 13, 1925, appeals are discretionary or of right (R. 265-268). It is only fair to say that this question was discussed by the parties, ourselves included. We believe, however, that it has no bearing on the question in hand.

There is no inconsistency between an appeal as of right and a requirement that such appeal be applied for and allowed. Rules 12, 36, and 46 of this court provide that all appeals must be sought and allowed, and that a jurisdictional statement be presented with the petition for appeal. These rules make no exception of appeals as of right.

In *McBee v. Palmer* (1934) 73 F. (2d) 342, an earlier decision of the court below, it was held that an appeal in a "controversy in bankruptcy," though an appeal of right, cannot be taken by mere notice, but must be applied for and that allowance thereof is jurisdictional.

The Circuit Court of Appeals, in the present opinion, made the further point that under section 11 of the Act of March 3, 1891 (c. 517, 26 Stat. 829), an appeal could be "taken" by notice without allowance, and it refers to the

word "taken" in sections 1 and 10 of the Act of February 13, 1925 (43 Stat. 937, 941), and in other statutes as indicating that section 8(c) was not intended to change the rule. This, we submit, is not a sound argument—the word "taken" does not imply that allowance is unnecessary.

In *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750, the court, after referring to section 8(c), said (p. 751):

> "This section superseded the portion of section 11 of the Act of March 3, 1891, c. 517, 26 Stat. 829, providing that no appeal or writ of error 'shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed.' This language, 'taken or sued out,' or 'brought,' as applied to a writ of error, and 'taken,' as applied to an appeal, as provided in the earlier acts, has been the subject of judicial construction since early times."

The court then reviewed many decisions of this court and of the lower federal courts (p. 751), most of which are cited in the preceding subdivision of this brief, holding that allowance by the court is necessary in order that an appeal shall be "taken" or "brought" or a writ of error "sued out." The court then said that

> "• • • the repeated adjudications, of which the foregoing citations are but a partial list, would seem to be conclusive upon the doctrine that the appellate court does not acquire jurisdiction until the appeal is allowed, either in open court at the same term, or until the petition for appeal, or its equivalent, is presented to either a Circuit or District Judge and acted upon by such judge, or until counsel has done all that could reasonably be required of counsel to accomplish such result" (p. 752).

Even more significant is the fact that although every statute permitting an appeal as of right from the district courts to this court provides that the appeal may be "taken,"* these cases are all subject to Rules 12, 36, and 46, requiring petitions for appeal, jurisdictional statements, and allowance of appeal.

In the brief of the respondent Weidemann opposing the issuance of certiorari (p. 12) reference is made to the provision in subdivision K of Rule 49 of the Admiralty Rules of 1920 (254 U.S., Append., pp. 22, 23) that "notice of or prayer for an appeal is to be included in the apostles." This rule, the respondent argues, recognizes that the circuit courts of appeals may provide for admiralty appeals by notice without allowance. But Rule 49 was adopted prior to the Act of February 13, 1925, and therefore has no bearing on the question now before the court. Nor does it follow that the rule recognized admiralty appeals without allowance, even before that statute. The authorities already cited are to the contrary. Furthermore, it is not inconsistent to have an appeal upon notice, but still to pro-

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*The five statutes permitting direct appeal from the district courts (Judicial Code, section 238; U.S.C. 28:345) provide in part as follows:

(a) The Expediting Act—appeals "must be *taken* within sixty days * * *" (Act of February 11, 1903, c. 544, section 2, 32 Stat. 823, as amended June 25, 1910, c. 428, 36 Stat. 854; U.S.C. 15:29; U.S.C. 49:45).

(b) The Criminal Appeals Act—"A writ of error [now appeal] may be *taken*," etc. (Act of March 2, 1907, c. 2564, 34 Stat. 1246; U.S.C. 18:682).

(c) Section 266 of the Judicial Code—"An appeal may be *taken* direct to the Supreme Court * * *" (Act of March 4, 1913, c. 160, 37 Stat. 1013, as amended by section 1 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 938; U.S.C. 28:380).

(d) The Urgent Deficiencies Act—"A final judgment or decree of the district court may be reviewed * * * if appeal to the Supreme Court be *taken* * * *" (Act of October 22, 1913, 38 Stat. 208, 219-221; U.S.C. 28:47, 47a).

(e) The Packers and Stockyards Act (Act of August 15, 1921, section 316, c. 64, 42 Stat. 159; U.S.C. 7:217). The provisions of the Urgent Deficiencies Act (supra) relating to injunction suits against orders of the Interstate Commerce Commission are made applicable by this section to proceedings to restrain or annul orders of the Secretary of Agriculture under the Packers and Stockyards Act.

vide that it shall not be effective unless allowed. Rule 37 of the Second Circuit is an illustration; it provides that appeals in admiralty shall be taken by filing and serving notice, but that "An allowance of the appeal shall be obtained and filed with the notice."

FOURTH: THE ORDERS SENDING UP ORIGINAL EXHIBITS AND AUTHORIZING OMISSIONS FROM THE APOSTLES WERE NOT EQUIVALENT TO THE ALLOWANCE OF PILLSBURY'S APPEAL. FURTHERMORE, IF PILLSBURY EVER HAD ANY RIGHT OF APPEAL SUCH RIGHT HAS BECOME MOOT. THIS IS BECAUSE WEIDEMANN IS THE SOLE BENEFICIARY OF THE DECREE, AND THE DECREE HAS BECOME FINAL AGAINST WEIDEMANN, SO THAT THERE IS NO RIGHT WHICH PILLSBURY COULD ENFORCE OR VINDICATE IF HIS APPEAL WERE SUCCESSFUL. STILL FURTHER, THE COURT WAS WITHOUT JURISDICTION BECAUSE THERE WAS NO SUMMONS AND SEVERANCE AS TO WEIDEMANN.

In the memorandum of the Solicitor General on the application for certiorari (p. 2), it is suggested that two orders obtained by Pillsbury in the District Court—one for the transmission of original exhibits, the other for omission of certain material from the apostles (R. 243, 250-251)—were sufficient to constitute an allowance of Pillsbury's appeal. Weidemann obtained no corresponding order, but he argues that the orders as to Pillsbury obviated the need for allowance of his (Weidemann's) appeal (Brief Opposing Issuance of Certiorari, pp. 12-15).

While we do not believe these contentions are within the scope of the order granting the writ, we nevertheless answer them as follows:

(a) The orders in question are not comparable to the signing of a citation or approval of an appeal bond, which acts were held to be the equivalent of allowance of appeal in *Sage v. Railroad Co.* (1877) 96 U. S. 712, 714, and other cases cited by us at page 22 of the petition for certiorari. The principle underlying these cases is that "No formal order of allowance of an appeal is necessary. • • • It is sufficient if the action of the court below shows that an appeal was prayed, and was in fact allowed" (*Chamberlain Transp. Co. v. South Pier Coal Co.* (7th C.C.A., 1903) 126 Fed. 165, 166). There must be "some action by the court that may be construed as an allowance of the writ" (*Vaughan v. American Ins. Co.* (5th C.C.A., 1926) 15 F. (2d) 526, 527.

Admittedly the allowing of an appeal was not in the mind of the judge when he signed the orders here in question, or of Pillsbury's counsel when he presented them. On the contrary, it is clear, as pointed out by the court below, "That the appeals in this case were taken by filing and serving notices of appeal as provided in Admiralty Rule 1" (R. 264). The orders here in question deal with formal matters having no relation to the allowance of an appeal, but, on the contrary, presupposing that an appeal already had been taken in compliance with statutory requirements. Under these circumstances it is clear that this case is in no way within the principle of the foregoing decisions sustaining appeals where the bond was approved or the citation signed. Furthermore, these earlier cases were decided under section 999 of the Revised Statutes, not under the Act of February 13, 1925.

We find no case directly in point, but the closest one is *Ross v. White* (6th C.C.A., 1929) 32 F. (2d) 750. It was there decided that the action of the judge in attesting the certificate of the clerk authenticating the transcript, although made in pursuance of a supposed appeal, is not equivalent to allowance of an appeal and is insufficient to comply with section 8(c) of the Act of February 13, 1925.

In *Vaughan v. American Ins. Co.*, supra, plaintiff in error obtained orders extending the term for the purpose of allowing him to present a petition for a writ of error and to have settled a bill of exceptions. Within the term as thus extended, but beyond the statutory time for the taking of an appeal, the petition for writ of error was presented to and allowed by the District Court. In dismissing the appeal the Circuit Court of Appeals said (15 F. (2d) 527):

> "It is contended by plaintiff in error that he gave notice of appeal in open court at the time the judgment was entered. This is not substantiated by the record, but it is immaterial. It may be conceded that a writ of error may be applied for by motion in open court, but merely giving notice of the intention to take such action in future amounts to nothing. The running of the statute is not stayed, unless there is some action by the court that may be construed as an allowance of the writ. Certainly that was not the case here, as the orders entered clearly indicate that it was contemplated that the writ of error would be subsequently applied for within the delay granted."

(b) The decree of the District Court adjudges that Weidemann is entitled to nothing, sets aside the award,

and enjoins Pillsbury from enforcing it (R. 231). Admittedly Weidemann obtained no order equivalent to allowance of his appeal; if his appeal was not effectively taken without allowance, then the decree as to Weidemann is final *against* him. Pillsbury has no personal interest in the award, *and under the statute cannot enforce it unless and until it becomes final in Weidemann's favor.* Section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act provides in part (44 Stat. 1436, U.S.C. 33:921):

> "If any employer or his officers or agents fails to comply with a compensation order making an award, *that has become final*, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District)."

It is unnecessary to argue whether in a proper case the deputy commissioner might have a right of appeal independently of the employee, because if ever he had such right in this case, his appeal is moot if Weidemann's appeal fails. The decree being final, against Weidemann, there is nothing which Pillsbury, as deputy commissioner, could enforce, even if he were successful on his own appeal.

(c) If Weidemann's appeal fails, Pillsbury's appeal must fail for want of a summons and severance. In the memorandum of the Solicitor General on the application for certiorari, it was suggested "that summons and sev-

erance are unnecessary because of the independent basis for action allowed the deputy commissioner by the statute'' (citing sections 21(c) and 22 of the Longshoremen's and Harbor Workers' Compensation Act, U.S.C. 33:921, 922). The reasons given in the preceding paragraph show, however, that the deputy commissioner's right of appeal, if it ever existed under the circumstances of this case, has become moot. Furthermore, the need for summons and severance depends entirely upon the face of the decree; summons and severance is indispensable where the decree is joint on its face, regardless of the nature of the substantive rights involved (*Hartford Accident Co. v. Bunn* (1932) 285 U.S. 169, 178-179).

The question as to what constitutes a joint decree is often difficult, but the present case is clear and it affords as much reason as any case could afford for applying the summons and severance rule. Pillsbury has no personal interest in the award; his statutory right to enforce it is dependent, as above shown, upon its having become final in Weidemann's favor. The interests of the two respondents are connected so far as this decree is concerned, so that the decree is clearly joint within the summons and severance rule.

We believe for these reasons that the suggestion that there was an indirect or implied allowance of Pillsbury's appeal is neither well founded nor material.

CONCLUSION.

We respectfully submit that the decision of the Circuit Court of Appeals should be reversed, with instructions to dismiss both appeals.

Dated, San Francisco, California,
February 10, 1937.

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